



DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD-2022-OS-0107]

U.S. Court of Appeals for the Armed Forces Proposed Rules Changes

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Notice of proposed changes to the rules of practice and procedure of the United States Court of Appeals for the Armed Forces.

SUMMARY: This notice announces a proposed addition and changes to the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces.

Although these rules of practice and procedure fall within the Administrative Procedure Act's exemptions for notice and comment, the Department, as a matter of policy, has decided to make these changes available for public review and comment before they are implemented.

DATES: Comments on the proposed changes must be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number and title by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Malcolm H. Squires, Jr., Clerk of the Court, telephone (202) 761-1449.

SUPPLEMENTARY INFORMATION: This notice announces the following proposed addition of Rule 36B and changes to Rules 9(e), 21A, 30A(c), and 36(a) of the Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces.

Dated: August 19, 2022.

Aaron T. Siegel,

Alternate OSD Federal Liaison Officer,

Department of Defense.

Rule 9(e):

Rule 9(e) – Clerk – currently reads:

(e) Hours. The Clerk’s office shall be open from 8:00 a.m. to 5:00 p.m. every day except Saturdays, Sundays, and legal holidays, or as otherwise ordered by the Court. *See* Rule 36(a). The Court is always open for filing of pleadings and other papers. A pleading or other paper may be filed outside of normal operating hours of the Clerk’s office by delivery to Court security personnel on duty in the front lobby of the courthouse. Pleadings will be deemed filed on the date and time delivered to Court security personnel. Court security personnel will notify the Clerk of the filing in accordance with procedures provided by the Clerk.

The proposed change to Rule 9(e) would read:

(e) Hours. The Clerk’s office shall maintain regular operating hours every day except Saturdays, Sundays, and legal holidays, or as otherwise ordered by the Court. *See* Rule 36(a). A pleading or other paper may be filed at any time by delivery to Court security personnel on duty in the front lobby of the courthouse or by electronically filing in accordance with the “Guidelines for Electronic Filings of Pleadings” available on the Court’s website. Pleadings will be deemed filed on the date and time delivered to Court security personnel or filed electronically. Court security personnel will notify the Clerk of the filing in accordance with procedures established by the Clerk.

Comment: Currently, Rule 9 makes no reference to the electronic filing system as a means of filing outside of the Court’s regular operating hours. Electronic filing is the most common means by which counsel file outside of work hours. The proposed revision will make attorneys unfamiliar with the e-filing procedures of the Court aware of it and direct them to the proper guidelines. The operating hours have been removed because they do not accurately represent the hours during which an attorney may file directly with the Clerk’s office.

Rules 21A

Rules 21A – Submissions Under U.S. v. Grostefon – currently reads:

(b) *Grostefon* issues shall be identified by counsel with particularity substantially in the following form:

(c) *Groستefon* issues raised within 30 days of the filing of the supplement under Rule 19(a)(5)(c) are subject to and included within the 15-page limit in Rule 21A(a).

The proposed change to Rule 21A would read:

(b) *Groستefon* issues shall be identified by counsel with particularity and, where pertinent, references to the record of trial must be to the specific page in the record. *Groستefon* issues shall be presented substantially in the following form:

(c) *Groستefon* issues raised within 30 days of the filing of the supplement under Rule 19(a)(5)(c) are subject to and included within the 15-page limit in Rule 21A(a). An appellee's answer to *Groستefon* issues may be filed no later than 20 days after the filing of such issues.

Comment: The addition of pertinent page citations to the record for *Groستefon* submissions would greatly facilitate the analysis of the issue; the rule change recognized that certain *Groستefon* issues, such as sentence severity and general claims of innocence, are not amenable to citation to specific pages of the record. Presently, Rule 21A(c) does not provide a time frame within which the government must file its answer. The inclusion of such a time frame will create consistency for counsel and timely review by the Court.

Rule 30A(c):

Rule 30A(c) – Factfinding – currently reads:

(c) Remand for Factfinding. If an issue concerning an unresolved material fact may affect the Court's resolution of the case, a party may request, or the Court may *sua sponte* order, a remand of the case or the record to the Court of Criminal Appeals. If the record is remanded, the Court retains jurisdiction over the case. If the case is remanded, the Court does not retain jurisdiction, and a new petition for grant of review or certificate for review will be necessary if a party seeks review of the proceedings conducted on remand.

The proposed change to Rule 30A(c) would read:

(c) Remand for Factfinding. If an issue concerning an unresolved material fact may affect the Court's resolution of the case, a party may request, or the Court may *sua sponte* order, a remand of the case or the record to the Court of Criminal Appeals. If the record is remanded, the Court retains jurisdiction over the case. *See* Article 66(f)(3), UCMJ, 10 USC §866(f)(3) (2018). If the case is remanded, the Court does not retain jurisdiction, and a new petition for grant of review or

certificate for review will be necessary if a party seeks review of the proceedings conducted on remand.

Comment: The cite to Article 66(f)(3) reflects legislation regarding *DuBay* hearings. *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Rule 36(a):

Rule 36(a) – Filing of Pleadings – currently reads:

(a) In General. Pleadings or other papers relative to a case shall be filed in the Clerk’s office, 450 E Street, Northwest, Washington, D.C. 20442-001, either in person, by mail, by third-party commercial carrier. *See* Rule 37(b)(2).

The proposed change to Rule 21(b) would read:

(a) In General. Pleadings or other papers relative to a case shall be filed in the Clerk’s office, 450 E Street, Northwest, Washington, D.C. 20442-001, either in person, by mail, by third-party commercial carrier, or by electronic filing. *See* Rule 37(b)(2). Documents submitted online must conform to the “Guidelines for Electronic Filings of Pleadings” available on the Court’s website.

Comment: Presently, Rule 36 makes no reference to electronic filing—the most common method utilized by attorneys—or the Court’s guidelines for e-filing. The most common practice for e-filing procedures is to have a separate handbook available online, as the Court does, rather than included in the Rules of Practice and Procedure of the Court or as a separate rule. The U.S. Court of Appeals for the Federal Circuit has no numerical rule, but the Foreword to the Rules of Appellate Procedure provides a link to a separate handbook. Rule 29.7 of the Rules of the Supreme Court of the United States references separate electronic filing guidelines. Rule 29.7 states only: “.... all filers who are represented by counsel must submit documents to the Court’s electronic filing system in conformity with the ‘Guidelines for the Submission of Documents to the Supreme Court’s Electronic Filing System.’” Additionally, Rule 25(a)(1) of the U.S. Court of Veterans Claims’ Rules of Practice and Procedure directs to that Court’s E-Rules. Updating Rule 36(a) to include the information on e-filing will bring our Court in line with the Article III and other Article I courts, and will provide the reader with clear and accurate instructions on filing with this Court.

Rule 36B:

The proposed Rule 36B would read:

Any reference to the Uniform Code of Military Justice or the Manual for Courts-Martial, United States, in any pleading or other paper filed with the Court, shall cite the relevant version of the statute, rule, or other provision, by date of edition.

Comment: As the UCMJ and the MCM continue to change, it is imperative that it is clear exactly which version of the statute the parties are relying upon. Including this new rule will allow the Court to proceed with certainty on whether the law put forth by counsel has changed since the initial pleading, whether counsel is relying on an outdated version of the statute, and whether it may now be inappropriate or inapplicable.

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